IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO.780 OF 2005
IN
NOTICE OF MOTION NO.2189 OF 2005
IN
SUIT NO.2027 OF 2005

Niraj Cement Structures
Private Limited ... Appellants

versus

Mumbai Metropolitan Region
Development Authority & ors. ... Respondents

Mr.Aspi Chinoy, Sr.Counsel with Piyush Shah i/by M/s.Mansukhlal Hiralal & Co. for appellants.

Mr.Shekhar Naphade, Sr.Counsel with Mr.Milind More, AGP for respondents.

CORAM : DR.S.RADHAKRISHNAN AND
S.C.DHARMADHIKARI, JJ.

DATE : 19th September 2005

PC :

1. Heard learned counsel for the appellant and respondents. By this appeal the appellant is seeking to challenge the order dated 26th August 2005 which is an ad-interim order. The learned Single Judge has declined to continue the earlier ad-interim order granted on 29th June 2005.

2. Mr.Aspi Chinoy - Learned Sr.Counsel appearing

for the appellant brought to our notice the provisions of the bank guarantee, especially clause 2, which is at Exhibit-C. Clause-2 provides that before invocation of the bank guarantee the MMRDA should state that the amount claimed is due by way of loss or damage that would be caused to or suffered by the MMRDA by reasons of breach by the contractor of any of the terms or conditions contained in the Agreement. The contention of learned counsel for the appellant is that if one will look at the two letters dated 18th May 2005 and 13th June 2005 then it will be clear that there is no mention of breach by the contractor of any of the terms and conditions of the agreement or of suffering loss or damage. It is the contention of the learned counsel for the appellant that invocation is not strictly in terms of the bank guarantee.

3. With regard to the said contention that the bank guarantee has not been invoked strictly in terms of the bank guarantee, learned counsel for the appellant strongly places reliance on two judgements of Supreme Court namely (1999)8-SCC-436 (Hindustan Construction Co. Ltd. Vs. State of Bihar and others) and (2003)7-SCC-410 (National Highways Authority of

India Vs. Ganga Enterprises and another). In Hindustan Construction Co. Ltd. case the Supreme Court in paragraph no.9 has clearly stated that invocation will have to be in accordance with the terms of the bank guarantee, or else, the invocation itself would be bad. In paragraph no.10 of National Highways Authority of India's case the Supreme Court has clearly observed that the Court can only interfere if the invocation is against the terms of the guarantee or if there is any fraud. Learned counsel for the appellant also relies upon two similar judgments of Delhi High Court.

4. Mr.Naphde - Sr.Counsel appearing for MMRDA points out that as far as respondent is concerned, the respondent is invoking the bank guarantee only against M/s.Ashoka Buildcon Limited which had executed the bank guarantee on 5th June 2004 and that the respondent is not concerned with the appellant and also the bank is only concerned with M/s.Ashoka Buildcon Ltd..

5. However, there is no dispute that the bank guarantees have been executed in the name of M/s.Ashoka Buildcon Limited and not in the name of present appellant. Present appellant claims

to be a sub-contractor of M/s.Ashoka Buildcon Ltd. approved by Mumbai Metropolitan Region Development Authority ("MMRDA" for short).

6. It may be noted that M/s.Ashoka Buildcon Ltd. is not even a party to the proceedings and the present appellant is not a party to the said bank guarantee at all. In the light of the above, we are not inclined to interfere with regard to aforesaid ad-interim order dated 26th August 2005. The appeal stands dismissed.

7. Learned counsel for the appellant seeks stay of the order for a period of two weeks from today. This order stands stayed for a period of two weeks. Certified copy expedited.

(DR.S.RADHAKRISHNAN, J.)

(S.C.DHARMADHIKARI, J.)